No. 06-582

In the Supreme Court of the United States

THE UNIVERSITY OF NOTRE DAME, PETITIONER

v.

JOAN LASKOWSKI, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT

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QUESTION PRESENTED

Whether a federal taxpayer may pursue an equitable restitution claim against a private grantee in federal court, where the underlying Establishment Clause claims against the federal government are moot and any recouped funds would be paid into the United States Treasury rather than to the plaintiff.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 4a-26a) is reported at 443 F.3d 930. The opinion of the court of appeals denying the petitions for rehearing (Pet. App. 1a-3a) is reported at 456 F.3d 702. The opinion of the district court (Pet. App. 27a-31a) is unreported.

JURISDICTION

The court of appeals entered its judgment on April 13, 2006. Petitions for rehearing were denied on July 26, 2006 (Pet. App. 1a-3a). The petition for a writ of certiorari was filed on October 24, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner developed a specialized program called Alliance for Catholic Education, which has successfully trained

teachers to work in disadvantaged and underserved schools. Pet. 2-3; Pet. App. 4a-5a. The program contains both secular and religious components. Pet. App. 4a-5a. In 2000, Congress earmarked a grant of approximately $500,000 for a "teacher quality initiative," which the Secretary of Education was to award to petitioner to permit it to replicate its program. *Id.* at 4a, 28a; see Consolidated Appropriations Act, 2000, Pub. L. No. 106-113, § 309, 113 Stat. 1501A-262.

The Secretary subsequently awarded the funds to petitioner, after receiving assurances that petitioner would comply with the regulations, policies, guidelines, and requirements imposed by the Secretary on federally funded projects, Laskowski C.A. App 21, including 34 C.F.R. 75.532 (2000), which precluded the use of grant funds to pay for "(1) [r]eligious worship, instruction, or proselytization"; "(2) [e]quipment or supplies to be used for any of those activities"; "(3) [c]onstruction, remodeling, repair, operation, or maintenance of any facility or part of a facility to be used for any of those activities"; and "(4) [a]n activity of a school or department of divinity."[1] The grant period ran from January 6, 2000, through December 31, 2004. Pet. App. 28a. After receiving the grant, petitioner entered into sub-grant agreements with four colleges and universities to implement its teacher initiative. Those sub-grant agreements included the same restrictions against the use of grant funds for religious purposes. See *ibid.*; Laskowski C.A. App. 47, 57, 62, 82.

2. In December 2003, Laskowski and Cook (respondents) filed suit against the Secretary of Education challenging the grant on Establishment Clause grounds. Pet. App. 28a. The sole ground for standing asserted was respondents' status as federal taxpayers. Amended Compl. 2, 4. The complaint

[1] The regulation has since been amended to remove subsections (3) and (4). See 34 C.F.R. 75.532; see also 69 Fed. Reg. 31,708-31,717 (2004).

sought declaratory and injunctive relief against the Secretary, as well as attorney's fees and other "proper relief" against the Secretary. *Id.* at 4-5. Petitioner subsequently intervened as a defendant in the litigation. Pet. App. 27a. Respondents never amended their complaint to assert any claims against or to seek any form of relief from petitioner.

While the case was pending in district court, the grant period expired and all of the grant funds were expended. Pet. App. 28a-29a. The district court then dismissed the case as moot, *id.* at 27a-31a, "[b]ecause the challenged Grant appropriation no longer exists," making the requested "injunctive and declaratory relief to enjoin [Secretary of Education] Spellings to withdraw her approval of the grant * * * no longer appropriate," *id.* at 29a. Because there was "no real prospect that [the grant] will be repeated," the court also rejected as "not ripe" a request for injunctive relief against "potential future funding" of petitioner's program. *Id.* at 29a n.1.

Finally, the district court rejected respondents' argument that the case was not moot because the court could enjoin the Secretary to recoup the grant funds. The court noted that there was a question whether that claim for relief had been "appropriately pled," and further held that it would not be a proper exercise of the equity power to grant such relief in light of the cessation of the grant. Pet. App. 30a-31a. Respondents did not argue that any relief was available against petitioner that might save the case from mootness.

3. a. A divided court of appeals vacated and remanded. Pet. App. 4a-26a. The court agreed with the district court that respondents' claim for injunctive relief against the Secretary of Education was moot due to the cessation of the grant and the unlikelihood of any renewal. *Id.* at 5a. The court also agreed that the court could not enjoin the Secretary to recoup the funds because "courts are not authorized to review a deci-

sion not to take an enforcement action; such decisions are within the absolute discretion of the enforcement agency" and are "well outside judicial competence." *Id.* at 6a-7a (citing *Heckler* v. *Chaney*, 470 U.S. 821 (1985)).

The majority nevertheless held that the case was not moot because "the depletion of the federal treasury by the amount of the grant" still "can be rectified simply by the restoration of the money to the U.S. Treasury." Pet. App. 5a-6a. The majority held that the district court could "simply order [petitioner] to return the money to the treasury." *Id.* at 7a. Permitting a private plaintiff to seek the same recoupment of funds to the Treasury that the court could not compel the Secretary to pursue, the majority reasoned, would "avoid needless circuity" by "cutting out the middleman." *Id.* at 9a. The majority deemed the Political Branches' traditional control over the Treasury to be "merely a detail" that "has no practical significance" to the remedial question, *id.* at 8a-9a.

b. Judge Sykes dissented. Pet. App. 14a-26a. Because the Establishment Clause applies only to government action, and because the lawsuit against the government is moot, she would have dismissed the case. *Id.* at 16a-17a. She described as "unknown to the law," *id.* at 22a, the majority's "newfangled" theory that the plaintiffs could obtain, not for themselves but for the federal Treasury, restitution relief against petitioner for the Secretary's alleged violation of the Establishment Clause, *id.* at 15a. She further noted that respondents themselves had never requested any such relief against petitioner "either in the district court or on appeal," *id.* at 17a, and argued that "[t]he rules of procedure do not permit the court to invent a new remedy in favor of plaintiffs who have not requested it in a case that is otherwise moot," *id.* at 18a n.1. Beyond that, she explained that restitution "is a private law equitable doctrine" that "has no application in a suit

by taxpayers raising an Establishment Clause challenge." *Id.* at 18a.

Judge Sykes further disagreed with the majority's assumption that taxpayer standing could support such a restitution claim. Judge Sykes explained that taxpayer standing has been limited to challenges to exercises of Congress's taxing and spending power, Pet. App. 20a, and does not extend to "[a] common law claim against Notre Dame for unjust enrichment based on the government's alleged Establishment Clause violation," *id.* at 22a. In her view, the limited exception for taxpayer standing carved out by this Court in *Flast* v. *Cohen*, 392 U.S. 83 (1968), does not vest federal taxpayers with "qui tam-like authority to force private parties to return federal grant money to the Treasury." Pet. App. 23a. She reasoned that "the connection between an individual citizen's tax payment and any given federal grant recipient is nonexistent, or at least far too attenuated to support an unjust enrichment cause of action or provide a basis for standing to sue a private party defendant on an Establishment Clause claim." *Id.* at 22a.

4. The court denied the government's and petitioner's petitions for rehearing and rehearing en banc. Pet. App. 1a-3a. Judges Manion, Kanne, and Sykes voted in favor of rehearing en banc. See Order Denying Reh'g En Banc (July 26, 2006); see also *Freedom from Religion Found., Inc.* v. *Chao*, 447 F.3d 988 (7th Cir. 2006) (Easterbrook, J., concurring in the denial of rehearing en banc) (noting that there is "considerable force" "in the standing analysis of Judge Sykes' dissent" in the instant case, and that "[t]wo divided decisions on related matters that put the judicial and the political branches of the federal government at odds imply the wisdom of further

review" by this Court), cert. granted, No. 06-157 (Dec. 1, 2006).[2]

DISCUSSION

Building on its unprecedented expansion of taxpayer standing in *Freedom from Religion Foundation, Inc.* v. *Chao*, 433 F.3d 989 (2006), cert. granted, No. 06-157 (Dec. 1, 2006), the Seventh Circuit held that the taxpayer standing doctrine vests private plaintiffs with "qui tam-like authority" (Pet. App. 15a (Sykes, J., dissenting)) to file restitution actions against *private parties* to recoup funds on behalf of the federal Treasury. The court made that extraordinary ruling in a case that was moot, and it crafted its "newfangled remedy," *ibid.*, without the benefit of briefing or argument on the question by the parties. The court of appeals' decision clearly disregards this Court's taxpayer-standing precedents and departs from established principles of judicial restraint in constitutional cases. Nonetheless, because this Court has already granted review to address the Seventh Circuit's sweeping conception of taxpayer standing in *Freedom from Religion Foundation*, *supra*, the Court should hold this petition pending disposition of that case.

1. The initial action brought by respondents against the Secretary of Education involved a traditional exercise of taxpayer standing under *Flast* v. *Cohen*, 392 U.S. 83 (1968), because it challenged the exercise of Congress's use of its taxing and spending power to provide an earmarked $500,000 grant to petitioner, which was to be administered by the Secretary. Once those grant funds were expended, however, the case against the Secretary became moot and respondents' taxpayer standing to challenge the grant expired. The court of appeals nevertheless permitted the action to continue by allowing the

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[2] Judges Ripple and Williams were recused from the case. See Order Denying Reh'g En Banc 2 n.* (July 26, 2006).

taxpayers to bring a restitution action on behalf of the federal Treasury against the private party that received the grant. By expanding taxpayer standing to include quasi-common-law actions against private entities that are designed not to remedy any individualized injury suffered by the plaintiff, but to "rectif[y] * * * the depletion of the federal treasury," Pet. App. 5a, the court of appeals' decision conflicts sharply with decisions of this Court.

a. Article III of the Constitution confines the judicial power to the resolution of actual "Cases" and "Controversies." U.S. Const. Art. III, § 2. An "essential and unchanging" component of that requirement is the rule that a plaintiff invoking the jurisdiction of the federal courts must have standing. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The "irreducible constitutional minimum of standing" requires that the plaintiff, *inter alia*, "have suffered an 'injury in fact'" in the form of the "invasion of a legally protected interest," that is both "concrete and particularized" and "actual or imminent, not 'conjectural' or 'hypothetical.'" *Id.* at 560 (citations omitted).[3]

This Court has generally rejected taxpayer status as a sufficient basis on which to predicate Article III standing, because a federal taxpayer's interest in the moneys of the treasury "is shared with millions of others; is comparatively minute and indeterminable; and the effect upon future taxation, of any payment out of the funds, so remote, fluctuating

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[3] To establish standing, a plaintiff also must identify a "causal connection between the injury and the conduct" of which he complains, such that the alleged injury is "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court," and the plaintiff must show that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 560-561 (internal quotation marks and citations omitted).

and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity." *Frothingham* v. *Mellon*, 262 U.S. 447, 487 (1923). "Standing has been rejected in such cases because the alleged injury is not 'concrete and particularized,' but instead a grievance the taxpayer 'suffers in some indefinite way in common with people generally,'" and because the injury "is not 'actual or imminent,' but instead 'conjectural or hypothetical.'" *DaimlerChrysler Corp.* v. *Cuno*, 126 S. Ct. 1854, 1862 (2006) (citations omitted).

In *Flast* v. *Cohen*, *supra*, this Court recognized a narrow exception to the general prohibition on taxpayer standing. The Court held that a taxpayer could bring an Establishment Clause challenge to Congress's exercise of its taxing and spending power to provide federal funding to private religious schools. See 392 U.S. at 102-104. The Court underscored, however, that taxpayer standing would extend "only [to] exercises of congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution" that are challenged on Establishment Clause grounds. *Id.* at 102.[4] That narrow departure from Article III's general prohibition on taxpayer standing was warranted, the Court stated, because "one of the specific evils feared by those who drafted the Establishment Clause and fought for its adoption was that the taxing and spending power would be used to favor one religion over another or to support religion in general." *Flast*, 392 U.S. at

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[4] *Flast* also held that the taxpayer must allege that Congress's exercise of its legislative power "exceed[ed] specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power," like the Establishment Clause, 392 U.S. at 102-103. The Court has never held that any other constitutional constraint on Congress's taxing and spending power would support taxpayer standing. See *DaimlerChrysler*, 126 S. Ct. at 1864 ("[O]nly the Establishment Clause has supported federal taxpayer suits since *Flast*.") (internal quotation marks and citation omitted).

103. The Court thus grounded the type of personal injury needed to establish taxpayer standing in this context on the historic constitutional concern that a taxpayer not be "force[d] * * * to contribute three pence only of his property for the support of any one establishment." *Ibid.* (citation omitted). Given the unique constitutional and historical pedigree of that concern, the Court held that an individual's claim that "his tax money is being extracted and spent in violation of [that] specific constitutional protection[] against such abuses of legislative power" could support Article III standing. *Id.* at 106.

b. In the ensuing four decades, this Court has consistently reaffirmed that *Flast* is a "narrow" and rarely invoked exception to the rule that taxpayer status is insufficient to establish Article III standing. *DaimlerChrysler*, 126 S. Ct. at 1865; see also *Bowen* v. *Kendrick*, 487 U.S. 589, 618 (1988) ("we have consistently adhered to *Flast* and the narrow exception it created to the general rule against taxpayer standing established in *Frothingham*"); *Valley Forge Christian Coll.* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 481 (1982) (discussing the "rigor with which the *Flast* exception to the *Frothingham* rule ought to be applied").

Last Term, the Court reiterated that *Flast* has a "narrow application in our precedent," *Daimler-Chrysler*, 126 S. Ct. at 1865, and is strictly limited to a claim that "congressional action under the taxing and spending clause is in derogation of the Establishment Clause," *id.* at 1864 (quoting *Flast*, 392 U.S. at 105-106). The Court stressed that taxpayer standing exists in that particular context—and no other—because Congress's "extract[ion] and spen[ding] of tax money in aid of religion," is "fundamentally unlike" an alleged violation of "almost any [other] constitutional constraint on government power," given the historical constitutional imperative of pro-

tecting citizens against "contribut[ing] three pence . . . for the support of any one [religious] establishment." *Id.* at 1864-1865. Thus, "the 'injury' alleged in Establishment Clause challenges to federal spending" that may give rise to standing is "the very 'extract[ion] and spend[ing]' of 'tax money' in aid of religion alleged by a plaintiff." *Id.* at 1865.

Likewise, in *Valley Forge Christian College*, the Court emphasized that the *Flast* exception must be applied with "rigor," 454 U.S. at 481, and rejected taxpayer standing where the plaintiffs challenged "not a congressional action, but a decision by [a federal agency] to transfer a parcel of federal property," *id.* at. 479. The Court explained that, while the agency's actions necessarily entailed the use of tax money, "the expenditure of public funds in an allegedly unconstitutional manner is not an injury sufficient to confer standing." *Id.* at 477. Rather, the Court reaffirmed, taxpayer standing is confined to "challenges directed only [at] exercises of congressional power." *Id.* at 479 (internal quotation marks omitted). A constitutional objection to "a particular Executive Branch action arguably authorized by [an] Act [of Congress]" will not suffice. *Id.* at 479 n.15.[5]

Finally, in *Bowen* v. *Kendrick*, the Court reaffirmed that taxpayer standing does not exist to challenge, on Establishment Clause grounds, "an incidental expenditure of tax funds in the administration of an essentially regulatory statute."

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[5] See also *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208, 227-228 (1974) (finding no taxpayer standing in a suit where the plaintiffs "did not challenge an enactment under Art. I, § 8, but rather the action of the Executive Branch in permitting Members of Congress to maintain their Reserve status"); *United States* v. *Richardson*, 418 U.S. 166, 175 (1974) (holding that a taxpayer lacks standing to compel the Secretary of the Treasury to publish an accounting of the receipts and expenditures of the Central Intelligence Agency, because that challenge was "not addressed to the taxing or spending power, but to the statutes regulating the CIA").

487 U.S. at 619 (quoting *Flast*, 392 U.S. at 102). As in *Flast*, the Court held that taxpayer standing permitted the plaintiffs to challenge on its face and as applied a statute permitting the distribution of federal grant money to private entities, including religious organizations. See 487 U.S. at 618. The Court explained that a challenge to "administratively made grants" fits *Flast*'s mold because the authorizing statute "is at heart a program of disbursement of funds pursuant to Congress' taxing and spending powers, and appellees' claims call into question how the funds authorized by Congress are being disbursed pursuant to the [Act]'s statutory mandate." *Id.* at 619-620.

The fact that the plaintiffs in *Kendrick* challenged not only the funding statute itself, but also the Executive Branch's distribution of funds to particular entities was consonant with *Flast*'s narrow reach, the Court explained, because the claim that "funds are being used improperly by individual grantees is [no] less a challenge to congressional taxing and spending power simply because the funding authorized by Congress has flowed through and been administered by the Secretary [of Health and Human Services]." 487 U.S. at 619. The key point was that the taxpayers' allegations "call[ed] into question how * * * funds authorized by Congress are being disbursed pursuant to * * * statutory mandate." *Id.* at 620.

c. The court of appeals' holding that federal taxpayer standing extends to support actions against private defendants to recoup funds for the federal Treasury defies that precedent.

First, an essential prerequisite to taxpayer standing is a "challenge[] directed *only* [at] exercises of congressional power" under the Taxing and Spending Clause. *Valley Forge*, 454 U.S. at 479 (emphasis added; internal quotation marks omitted); *Flast*, 392 U.S. at 106 (challenge must be to "con-

gressional action under the taxing and spending clause" alleged to be in derogation of the Establishment Clause); *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208, 225 n.15 (1974) ("[T]he *Flast* nexus test is not applicable where the taxing and spending power is not challenged.").

The equitable restitution action that the court of appeals fashioned in this case challenges the expenditure of funds by a private entity, not an exercise of Congress's taxing and spending power. The challenge here is not to the constitutionality of the congressional funding program, but is actually a dispute over whether the private party reasonably complied with the terms of the grant. Yet disputes over whether grant recipients comply with funding conditions are not limited to the Establishment Clause context, and they do not justify a use of taxpayer standing.

Indeed, in the court of appeals' view, the central issue on remand will be common-law conceptions of "reasonable reliance" by a private party. Pet. App. 10a; see *id.* at 9a-14a. While the alleged unconstitutionality of congressional action may provide a predicate for recovery, *id.* at 12a, it would not be sufficient to prevail. To support the action, taxpayer standing will have to extend beyond that constitutional question into litigating the private-law question of the reasonableness of the private party's reliance on the propriety of the grant. *Id.* at 10a. But that question has nothing to do with Congress's exercise of its taxing and spending power.

Second, taxpayer standing exists "only" to challenge governmental conduct in derogation of the Establishment Clause. *DaimlerChrysler*, 126 S. Ct. at 1864. Private entities like petitioner, however, are not subject to the Establishment Clause and are incapable of violating it. Recovery in respondents' restitution claim will turn largely on whether petitioner acted in derogation of common-law principles of reasonable reliance, rather than Establishment Clause principles. How-

ever, under this Court's cases, respondents' taxpayer standing extends no further than resolution of that constitutional question—a question about governmental conduct that is indisputably moot in this case. *Ibid.*

Third, as this Court recently reemphasized, taxpayer standing supports prospective relief aimed at halting "the very 'extract[ion] and spen[ding]' of 'tax money.'" *DaimlerChrysler*, 126 S. Ct. at 1865 (quoting *Flast*, 392 U.S. at 106). "[A]n injunction against the spending would of course redress *that* injury." *Ibid.* Likewise, in *Bowen*, the Court described a present and ongoing predicate injury in how funds "are being disbursed" by the government. 487 U.S. at 620.

The retrospective recoupment of funds that have long-since left the control of the government, by contrast, does not redress any individualized interest in avoiding "contribut[ing] three pence . . . for the support of any one [religious] establishment." *DaimlerChrysler*, 126 S. Ct. at 1864 (quoting *Flast*, 392 U.S. at 103). Congress's extraction and spending of taxpayer dollars to fund the grant to petitioner is over and done with. Indeed, the court candidly acknowledged that the restitution action it devised is not aimed at protecting the interests of individual taxpayers, but at rectifying "the depletion of the federal treasury." Pet. App. 5a. That is precisely the type of attenuated "interest in the moneys of the Treasury" that this Court has consistently held does *not* support taxpayer standing. *DaimlerChrysler*, 126 S. Ct. at 1862; *Frothingham*, 262 U.S. at 486-487; see *Valley Forge*, 454 U.S. at 485 n.20. "An interest unrelated to injury in fact is insufficient to give a plaintiff standing." *Vermont Agency of Natu-*

ral Res. v. *United States ex rel. Stevens*, 529 U.S. 765, 772 (2000).[6]

2. By vesting private plaintiffs with the "qui tam-like authority" (Pet. App. 15a (Sykes, J., dissenting)) to bring a judicially created cause of action to vindicate the federal Treasury, the court's decision transgresses the constitutional separation of powers. The court of appeals acknowledged that it lacked the "competence" to "take over the prosecutorial function" and superintend the government's decision to recoup governmental funds. *Id.* at 7a. But the court nevertheless assumed the authority to "cut[] out the middleman"—the Executive Branch—and create a new cause of action whereby courts may deputize private plaintiffs to assume the very prosecutorial function the court of appeals had just eschewed. In the court's eyes, the Executive Branch's constitutionally prescribed role in ensuring the faithful execution of the laws is "merely a detail" and "of no practical significance" to the court's authority to vindicate the federal Treasury. *Id.* at 8a-9a.

But the separation of powers is not "needless circuity," Pet. App. 9a. The Constitution charges the Political Branches with protecting and preserving the federal fisc and, in particular, "secur[ing] the treasury or the government against financial losses, including requiring reimbursement for injuries." *United States* v. *Standard Oil Co.*, 332 U.S. 301, 314-315 (1947). It is the Executive's task to "take care that the laws be faithfully executed," U.S. Const. Art. II, § 3, not the

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[6] In *Vermont Agency*, this Court held that qui tam relators have Article III standing to vindicate the public fisc and receive a statutory "bounty" only because Congress, in the False Claims Act, "effect[ed] a partial assignment of the Government's damages claim." 529 U.S. at 773. But neither Article III nor the Establishment Clause vests the Judiciary with the authority to assign to private plaintiffs the government's claims to allegedly misspent grant funds.

courts and not private parties. See *Heckler* v. *Chaney*, 470 U.S. 821, 831-832 (1985); see also *OPM* v. *Richmond*, 496 U.S. 414, 425 (1990) (the Judicial Branch's Article III powers are "limited by a valid reservation of congressional control over funds in the Treasury"). The government's decision to enforce or not to enforce funding conditions "is a decision generally committed to an agency's *absolute* discretion." *Heckler*, 470 U.S. at 831 (emphasis added). The majority's assumption of the unilateral power to appoint private attorneys general to vindicate the interests of the Treasury in Establishment Clause cases flouts those principles, and raises additional constitutional concerns under the Appointments Clause, U.S. Const. Art. II, § 2. See *Vermont Agency*, 529 U.S. at 778 n.8.

Although the majority relied (Pet. App. 9a-10a) on *Roemer* v. *Board of Public Works*, 426 U.S. 736 (1976), *Lemon* v. *Kurtzman*, 411 U.S. 192 (1973), and *New York* v. *Cathedral Academy*, 434 U.S. 125 (1977), those cases in fact significantly undercut the court's holding. A plurality in *Lemon* held that a *State* could use taxpayer funds to reimburse school districts for costs they had reasonably incurred prior to the invalidation of a funding program. 411 U.S. at 207-209 (opinion of Burger, C.J.). In so holding, the court stressed that federalism principles precluded judicial imposition of "draconian, retrospective decrees" that punished reasonable adherence to "legislative directives." *Id.* at 207. Those same considerations of judicial restraint and federalism equally foreclose the imposition of draconian retrospective remedial schemes on grantees. See Amicus Br. of Indiana, *et al.*, 5-7.

Cathedral Academy likewise involved a prospective state effort to pay reimbursement, not a private action to recoup past funding. 434 U.S. at 130-134. Finally, the footnoted discussion of repayment in *Roemer* was dicta in a three-Justice plurality opinion, and even there the plurality opined that "the separation of church and state may well be better served

by not putting the State of Maryland in the position of a judgment creditor of the appellee colleges." 426 U.S. at 768 n.23 (opinion of Blackmun, J.).

3. Like *Freedom from Religion Foundation*, *supra*, this case raises important questions of constitutional law concerning the delicate balance of power between the Judicial and Executive Branches. Indeed, as the Court observed last Term, "[n]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal court-jurisdiction to actual cases or controversies," including the standing requirement. *DaimlerChrysler*, 126 S. Ct. at 1861 (internal quotation marks omitted). The Seventh Circuit's unprecedented expansion of taxpayer standing in a manner that undermines the Political Branches' control over the federal Treasury threatens the very accretion of judicial power against which this Court's taxpayer-standing cases have consistently cautioned.

The constitutional concerns raised by the court's decision do not stop there. Established principles of judicial restraint require that courts not "decide questions of a constitutional nature unless absolutely necessary to a decision of the case." *Burton* v. *United States*, 196 U.S. 283, 295 (1905); see *Ashwander* v. *Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). But the case that respondents brought—the constitutional claims they asserted and the remedies they sought—are moot. The court's unilateral expansion of taxpayer standing to formulate an entirely novel cause of action and a remedy that respondents never sought against a defendant against whom they never asserted any claims stands that principle of judicial restraint on its head. In addition, the court of appeals' decision ignores this Court's admonition in *Valley Forge* that "[p]roper regard for the complex nature of our constitutional structure requires" that courts not "hospitably accept for adjudication" claims resting

on nothing more than an alleged affront to taxpayers. 454 U.S. at 474.

The court's dramatic expansion of taxpayer standing also is likely to have a substantial chilling effect on the willingness of private organizations to participate as providers of secular government services pursuant to federal grants or contracts. See Pet. 25-26; Thomas More Amicus Br. 5-16. Such organizations—including numerous charitable and non-profit organizations providing critical secular services, such as job training, educational tutoring, and food and shelter for the neediest of citizens—now face the threat of protracted recoupment litigation at the instigation of any one of the of the more than 11 million federal taxpayers within the Seventh Circuit inclined to seek reimbursement of federal funds that were long ago received and spent. Indeed, one district court, relying on the court of appeals' decision in this case, recently ordered a state grantee to repay $1.5 million to the Iowa state treasury. See *Americans United for Separation of Church & State* v. *Prison Fellowship Ministries*, 432 F. Supp. 2d 862, 938, 941 (S.D. Iowa 2006). Yet this Court has cautioned that those who cooperate with legislative programs should not have to proceed at "the peril of having their arrangements unraveled if they act before there has been an authoritative judicial determination that the governing legislation is constitutional." *Lemon*, 411 U.S. at 207 (opinion of Burger, C.J.).

4. For the foregoing reasons, the Seventh Circuit erred in vesting taxpayers with standing and a judicially created cause of action to seek reimbursement of the federal Treasury through restitution actions against private grantees. The court's decision significantly departs from this Court's precedent. In addition, the question presented is important in light of the separation-of-powers concerns created by the court's decision and the potential chilling effect on the willingness of

private organizations to participate as the providers of secular services in important government programs.

In *Hein* v. *Freedom from Religion Foundation, Inc.*, No. 06-157 (Dec. 1, 2006), this Court recently granted review to address the Seventh Circuit's expansive conception of taxpayer standing, including the extent to which such litigation is confined to challenges to an exercise of Congress's taxing and spending power. See 06-157 Pet. 14-16. This case likewise reflects an abandonment of established limitations on taxpayer standing, but it also raises separate and distinct separation-of-powers concerns because the court has created a new cause of action that permits private plaintiffs to bring restitution actions to reimburse the public fisc. Even where taxpayer standing otherwise exists to maintain an Establishment Clause claim against the federal government, there is no constitutional, precedential, or other basis for the extraordinary remedial action fashioned by the court below.

In short, the sensitive constitutional questions implicated by the court of appeals' decision and its potentially far-reaching legal and practical implications merit this Court's action. Nevertheless, the Court's disposition of *Hein* may provide guidance relevant to the court of appeals' decision in this case and could potentially obviate the need for this Court' s plenary review. Accordingly, the Court may wish to hold the petition pending the Court's decision in *Hein*.

CONCLUSION

For the foregoing reasons, the Court should hold the petition for a writ of certiorari pending this Court's decision in *Hein* v. *Freedom from Religion Foundation, Inc.*, No. 06-157.

Respectfully submitted.

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